Barclay International Pte Ltd v Global Cable Solution Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-597–11 OF 2015
CHAN JIT LI JC
21 SEPTEMBER 2016

Civil Procedure — Summary judgment — Whether triable issues raised — Plaintiff commenced action against defendant for outstanding sum pursuant to goods sold and delivered — Whether defendant received goods — Whether plaintiff would be unjustly enriched if judgment given to plaintiff — Rules of Court 2012 O 14

The plaintiff's cause of action in the present case was premised on goods sold and delivered to the defendant ('the goods'). Based on the account statements of the transaction between the parties, the plaintiff discovered that there was an outstanding sum of RM278,323.23 due from the defendant, hence, the plaintiff brought the present action for summary judgment ('encl 7') pursuant to O 14 of the Rules of Court 2012 to claim for the said sum. In support of its claim, the plaintiff relied on the documents such as the defendant's order, the tax levied and paid, the freight charges for the delivery of the consignment in question and the delivery order. In defence, the defendant submitted that they did not receive the goods which were delivered at their office in Dutamas which was shared with another company known as Bintang Mahajaya Sdn Bhd ('Bintang Mahajaya') as they had moved out of the office. It was further submitted that Bintang Mahajaya was withholding the goods on the instruction of one Thomas who was the director of both Bintang Mahajaya and the plaintiff, as such, if the plaintiff was given judgment, the plaintiff would be unjustly enriched as it would receive payment of goods which were still in its possession. It must be noted that there was a separate High Court suit ('second suit') filed by the defendant against Bintang Mahajaya for the ownership of the very goods which was the subject matter of the present case. The issue for determination was whether the defendant had raised a triable issue.

Held, allowing encl 7 with costs of RM1,500:

(1) On the evidence, all exhibited delivery orders were duly signed and carried the defendant's stamp, hence, the plaintiff did deliver the goods as per the defendant's orders and the goods were received by the defendant's agents. Further, all the goods had been consistently delivered to the same premises in Dutamas and the defendant had never disputed this delivery address; in fact, the defendant had made some payments for the deliveries

made to this address. Thus, this was a clear case in which the plaintiff was entitled to judgment barring any triable issue shown (see paras 15–17).

(2) There was no averment that the defendant had informed the plaintiff of the change of address. Further, the defendant's statements made in the second suit claiming ownership of the goods could not be reconciled with its statements in the present case where it denied receiving the same. This blatant contradiction showed that the defendant was not telling the truth. In the circumstances, the court could not accept the defendant's claim that it did not receive the goods and concluded that this claim of a triable issue was nothing more than a sham (see paras 24, 29–30 & 33).

(3) A single bare statement that Thomas was a director of both companies was insufficient. The defendant must aver some special circumstances so that the court may have the legal basis to exercise the court's discretion in its favour. However, there was no such averment in the present case, hence, the defendant had also failed to show that this constituted triable issue (see paras 42–44).

[Bahasa Malaysia summary

Kausa tindakan plaintif dalam kes ini adalah berdasarkan atas barangan yang dijual dan dihantar kepada defendan ('barangan'). Berdasarkan penyataan akaun transaksi di antara pihka-pihak, plaintif mendapati bahawa terdapat jumlah yang belum dibayar sebanyak RM278,323.23 yang kena dibayar oleh defendan, maka, plaintif membawa tindakan ini untuk penghakiman terus ('lampiran 7') berikutan A 14 Kaedah-Kaedah Mahkamah 2012 untuk menuntut jumlah tersebut. Dalam menyokong tuntutannya, plaintif bergantung ke atas dokumen seperti pesanan defendan, cukai yang dilevi dan dibayar, caj pengangkutan bagi penghantaran konsainan yang dipersoalkan dan pesanan penghantaran. Dalam pembelaan, defendan berhujah bahawa mereka tidak menerima barangan yang mana dihantar di pejabat mereka di Dutamas yang mana dikongsi dengan syarikat lain yang dikenali sebagai Bintang Mahajaya Sdn Bhd ('Bintang Mahajaya') kerana mereka telah berpindah keluar daripada pejabat tersebut. Ia selanjutnya dihujahkan bahawa Bintang Mahajaya menahan barangan tersebut atas arahan seorang yang bernama Thomas yang mana adalah pengarah kedua-dua Bintang Mahajaya dan plaintif, dengan itu, jika plaintif diberikan penghakiman, plaintif akan dikayakan dengan tidak adil kerana ia akan menerima bayaran terhadap barangan yang masih dalam milikannya. Ia perlu ditekankan bahawa terdapat tindakan Mahkamah Tinggi yang berasingan ('tindakan kedua') difailkan oleh defendan terhadap Bintang Mahajaya bagi milikan terhadap barangan tersebut yang mana adalah perkara kes ini. Isu untuk penentuan adalah sama ada defendan telah membangkitkan isu yang boleh dibicarakan.

Diputuskan, membenarkan lampiran 7 dengan kos sebanyak RM1,500:

(1) Atas keterangan, kesemua pesanan penghantaran yang ditunjukkan ditandatangani dan mempunyai cap syarikat defendan, maka, plaintif telah menghantar barangan tersebut seperti pesanan defendan dan barangan tersebut diterima oleh ejen defendan. Selanjutnya, kesemua barangan tersebut telah secara konsisten dihantar ke premis yang sama di Dutamas dan defendan tidak mempertikaikan alamat penghantaran ini; sebenarnya, defendan telah membuat beberapa bayaran bagi penghantaran yang dibuat kepada alamat ini. Oleh itu, ini adalah kes yang jelas di mana plaintif berhak kepada penghakiman kalau tiada apa-apa isu yang boleh dibicarakan ditunjuk (lihat perenggan 15–17).

(2) Tidak terdapat penegasan bahawa defendan telah memberitahu plaintif terhadap penukaran alamat. Selanjutnya, pernyataan defendan yang dibuat dalam tindakan kedua yang menuntut milikan terhadap barangan tersebut tidak boleh diselesaikan dengan pernyataannya di dalam kes ini di mana ia menafi menerimanya. Penyangkalan terang-terangan ini menunjukkan bahawa defendan bercakap benar. Dalam keadaan ini, mahkamah tidak boleh menerima barangan tersebut dan memutuskan tuntutan isu yang boleh dibicarakan ini tidak lebih daripada penipuan (lihat perenggan 24, 29–30 & 33).

(3) Penyataan kosong bahawa Thomas adalah pengarah kepada kedua-dua syarikat adalah tidak memadai. Defendan mesti menegaskan sesuatu keadaan khusus dengan itu mahkamah mungkin mempunyai asas undang-undang untuk melaksanakan budi bicara mahkamah memihak kepadanya. Walau bagaimanapun, tidak terdapat penegasan sedemikian dalam kes ini, maka, defendan juga telah gagal untuk menunjukkan bahawa ini membentuk isu boleh dibicarakan (lihat perenggan 42–44).]

Notes

For cases on whether triable issues raised, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9849–10091.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (folld)
DCB Bank Berhad v NS Bahtera Sdn Bhd & 2 Ors [1999] 2 AMR 1790, HC (refd)
General Trading Corporation (M) Sdn Bhd v Overseas Lumber Bhd [1977] 1 MLJ 108, FC (refd)
Law Kam Loy and Anor v Boltex Sdn Bhd and others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Catherine Lee v Lee's Air Farming Ltd [1961] AC 12 (refd)
Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)

Legislation referred to

Companies Act 1965 s 19(5)
Rules of Court 2012 O 14, Form 18

Eunice Ong (Eunice Derek & Co) for the plaintiff.
Sukhdev Singh Randhawa (Azlan Shah Sukhdev & Co) for the defendant.

Chan Jit Li JC:

[1] Enclosure (7) is the plaintiff's application for summary judgment under O 14 of the Rules of Court 2012.

[2] The plaintiff's cause of action is premised on goods sold and delivered.

[3] It is a company incorporated in Singapore and conducts general wholesale trade including general importers and exporters.

[4] The defendant is a Malaysian company dealing with 'mechatronics' and automation.

[5] According to the plaintiff, their business relationship started sometime in 2014. The defendant would place its orders either by way of telephone calls or through purchase orders. Upon receipt of these orders, the plaintiff would take the necessary steps to deliver the goods.

[6] It was also agreed that the plaintiff would first pay for both the freight charges and the Malaysian customs duties and later be reimbursed by the plaintiff. The Singapore currency would be used in their dealings.

[7] As evidence of its claim, the plaintiff produced email confirmations, purchase orders, packing lists, delivery orders, declaration of goods imported, international airway bills, subsidiary export certificates, commercial invoices and tax invoices, details of which are in para 5.9.1 of the plaintiff's affidavit in support of the application (encl 8).

[8] The plaintiff states that it was its practice to keep a running account of their business transactions and provide the defendant with account statements from time to time. These statements will reflect the value of the goods delivered, the payments made and the outstanding amount due from the defendant.

[9] According to the plaintiff, its accounts show that as at 31 May 2015 an

outstanding sum of SGD91,220.62 (RM278,323.23) was due from the defendant.

[10] The present suit was instituted after the defendant refused to pay this outstanding amount even after demands were made.

[11] In compliance with the rules of procedure the plaintiff in its O 14 application must file an affidavit in Form 18 setting out:

(a) the facts on which the claim arises; and

(b) the deponent's belief that there is no defence to the claim or except to the quantum of damages claimed.

[12] Once the plaintiff has satisfied this procedural requirement, the burden then shifts to the defendant to show a triable issue.

[13] In *DCB Bank Berhad v NS Bahtera Sdn Bhd & 2 Ors* [1999] 2 AMR 1790, Abdul Aziz bin Mohamed J (as he then was) held as follows:

> ... In an application for summary judgment a plaintiff is only required to establish a prima facie case and to state his belief that there is no defence to his claim, upon which the burden then shifts to the defendant to show a triable issue.

THE FACTS ON WHICH THE PLAINTIFF RELIES UPON FOR THEIR CLAIM

[14] I have perused the documents which the plaintiff relies on to prove its claim. By way of exh NSC3 of encl 8, the plaintiff has listed all of the transactions between them. The documents for each and every transaction are complete in that every transaction is supported by the following documents, namely, the defendant's order, the tax levied and paid, the freight charges for the delivery of the consignment in question and the delivery order.

[15] The totality of the evidence point to the irrefutable conclusion that the plaintiff did deliver the goods as per the defendant's orders and the goods were received by the defendant's agents. This is evidenced by the fact that all exhibited delivery orders were duly signed and carried the defendant's stamp.

[16] Further, all goods had been consistently delivered to the same premises at No 7, Jalan Dutamas 4, Taman Dutamas, 43200 Balakong, Selangor. The defendant had never disputed this delivery address before this. As a matter of fact the defendant had made some payments for the deliveries made to this address.

[17] Based on the plaintiff's averments and exhibits I am satisfied that this is a clear case in which the plaintiff is entitled to judgment barring any triable issue shown (*General Trading Corporation (M) Sdn Bhd v Overseas Lumber Bhd* [1977] 1 MLJ 108 referred).

WHETHER THE DEFENDANT HAS RAISED A TRIABLE ISSUE

[18] As O 14 proceeding is never intended to shut out a defendant, the defendant is only required to show one triable issue and nothing more. What amounts to a triable issue depends on the facts and the law applicable in each particular case (*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 referred).

[19] In *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225 Mohamed Dzaiddin J (as he then was) explains what a triable issue means:

> The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable ground of a bona fide defence.

[20] I propose to deal with the defendant's contention that there are triable issues under the following broad issues:

(a) that the defendant did not receive the goods; and

(b) that the plaintiff seeks to enrich itself unjustly by colluding with a third party to deprive the defendant of the goods.

That the defendant did not receive the goods

[21] *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 is instructive as to how a court should deal with averments made in an O 14 application. His Lordship Mohamed Azmi SCJ held at p 406:

> ... Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[22] Now in our case, the defendant explains that initially its office was at No 7, Jalan Dutamas 4, Taman Dutamas, 43200 Balakong, Selangor. It shared the said premises with another company known as Bintang Mahajaya Sdn Bhd ('Bintang Mahajaya'). Subsequently the defendant moved out of the said premises but Bintang Mahajaya stayed on.

[23] The defendant's averments in relation to this issue are contained in paras 6 and 7 of its affidavit in reply which appears as follows:

> 6. Saya menyatakan bahawa Plaintif tidak menerima barangan yang dikatakan di perenggan 5 dan 6 ASP (affidavit sokongan Plaintif) dan menyatakan invois-invois, pesanan pembelian dan pesanan penghantaran yang dilampirkan di ASP dan ditandakan sebagai 'NSC-3' adalah dialamatkan ke alamat lama Plaintif.
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> 7. Saya menyatakan invois-invois, pesanan pembelian dan pesanan penghantaran telah dialamatkan ke No. 7, Jalan Dutamas 4, Taman Dutamas, 43200 Balakong, Selangor Darul Ehsan ['premis tersebut'] dan saya ingin menyatakan bahawa premis tersebut diduduki oleh syarikat yang lain iaitu Bintang Mahajaya Sdn Bhd[BMJ] di mana syarikat tersebut diwakili oleh peguamcara yang sama, iaitu Tetuan Azlan Shah Sukhdev & Co ...

[24] There is no mention as to where the new delivery destination is. Neither does the defendant aver that it had duly informed the plaintiff of a change of address. The communication of the destination change to the plaintiff is a reasonable expectation and should be a matter of course as all previous deliveries had been made to the Dutamas address.

[25] With the defendant's loud silence on these issues, I view the defendant's complain of non-receipt of goods with grave suspect.

[26] My suspicions of the defendant's credibility are further fortified by the defendant's statements made in another Shah Alam High Court case. Registered as 22NCVC-460–08 of 2015, that case is relevant to the present case because the subject matter in that case are the very goods which is the subject matter of this case.

[27] The plaintiff, however, is not a party in that suit. Instead 22NCVC-460–08 of 2015 was instituted by the defendant against Bintang Mahajaya.

[28] In that case claiming itself to be the owner of the goods the defendant (the plaintiff in that case) seeks, among other reliefs, a declaration that it is the owner of the goods and a further order that Bintang Mahajaya do return the goods to it.

[29] The defendant's statements made in 22NCVC-460–08 of 2015

claiming ownership of these goods cannot be reconciled with the statements it makes in the present case where it denies receiving the same.

[30] This blatant contradiction only goes to show that the defendant is not telling the truth.

[31] I also note the defendant's inconsistencies in it attempts to recover the goods in 22NCVC-460–08 of 2015. In para 8 of the statement of claim in that case (exh LLC5 of the defendant's affidavit in reply in respect of this application), the defendant states that it *overlooked removing the goods* when it moved out of the premises on 1 May 2015. However, at para 12 of the statement of claim, the defendant avers that it had given Bintang Mahajaya notice that *it was withdrawing its consent* for the latter to detain the goods through its letters of 23 June 2015 and 1 July 2015.

[32] I do not propose to dwell in depth over these contradictions. It suffices to say that in so far as this case is concerned, those statements show two material facts favourable to the plaintiff. Firstly, the plaintiff's goods must have been delivered to the Dutamas address before the defendant moved out as otherwise the defendant could not have overlooked the removal of the goods. Secondly, the defendant must have known of and considered itself to be the owner as otherwise it would not be in a position to give the consent to Bintang Mahajaya to detain the goods.

[33] Against this backdrop, I find that I am unable to accept the defendant's claim that it did not receive the goods. This claim of a triable issue is nothing more than a sham.

That the plaintiff is seeking to enrich itself unjustly

[34] The defendant avers that Bintang Mahajaya continues to occupy the premises in question until today.

[35] It claims that Bintang Mahajaya is refusing to grant it access to the Dutamas premises to remove the goods. In other words, Bintang Mahajaya is withholding the goods. The defendant also alleges that Bintang Mahajaya is acting in such a manner on the instructions of one Thomas Tay Hao Ping ('Thomas').

[36] Thomas is a director of both Bintang Mahajaya and the plaintiff-company. It is therefore the defendant's contention that if the plaintiff is given judgment, the plaintiff will be unjustly enriched as it will receive payment for goods which are still in its possession.

[37] I find the defendant's argument baseless for the following reasons. A

[38] It is trite law that a company is a distinct and separate entity by itself (s 19(5) of the Companies Act 1965, *Salomon v A Salomon & Co Ltd* [1897] AC 22, *Catherine Lee v Lee's Air Farming Ltd* [1961] AC 12). B

[39] And it is the defendant's own assertion that the goods are with Bintang Mahajaya and not the plaintiff or Thomas.

[40] I am of the view that if the defendant desires to pursue this issue it is incumbent upon the defendant to show that the facts of this case *may* warrant the lifting of the corporate veil. C

[41] In dealing with the issue as to when it is appropriate for the court to lift the corporate veil, Gopal Sri Ram JCA (as he then was) in the case of *Law Kam Loy and Anor v Boltex Sdn Bhd and others* [2005] 3 CLJ 355 held at pp 362–363: D

> In my judgement in the light of the more recent authorities such as *Adams v Cape Industries Plc* , it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity ... E
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> ... In the present appeal, it is not the plaintiffs' case that special circumstances exist here indicating that Boltex is a mere façade concealing the true facts. Nor was a case of actual or equitable fraud raised on the pleading. It is therefore of no avail to the plaintiffs to say without more than this is a case of piercing the corporate veil. They simply did not lay any evidential foundation to support that plea. On the basis of current authority there is therefore no justification whatsoever in law to pierce the corporate veil ... F G

[42] This is not to say that a defendant in an O 14 application must bear such an onerous burden. But equally a single bare statement that Thomas is a director of both companies is just not sufficient. The defendant must aver some special circumstances so that the court may have the legal basis to exercise the court's discretion in its favour. H

[43] But there is no such averment in this case. I

[44] Accordingly, I find that the defendant has also failed to show that this constitutes a triable issue.

[45] This is clearly an instance in which the defendant's case comprises of only bare assertions and denials and is devoid of any arguable issues of fact or law which merits further determination at a trial. The plaintiff should not be deprived of his judgment.

[46] Enclosure 7 is therefore allowed with costs of RM1,500.

Enclosure 7 allowed with costs of RM1,500.

Reported by Dzulqarnain Ab Fatar